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IN THE

Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

INTRODUCTION

The two questions on which this Court has granted certiorari affect the rights of tens of millions of American workers and retirees. For this reason, petitioner's position has received the support of the United States, the American Association of Retired Persons, the Pension Rights Center, the National Employment Lawyers' Association, the Air Line Pilot's Association International, the Self Insurance Institute of America, and a coalition of law professors.[1] In an eleventh hour attempt to avoid the resolution of these two

[1] Counsel for both petitioner and respondents have consented to the filing of briefs *amicus curiae* in support of petitioner by these groups.

important questions, respondents have filed a frivolous motion to dismiss the writ.

1. Respondents' motion is predicated entirely on their recent "discovery" that, in July 2006, petitioner "withdrew all of his funds from his account in the DeWolff [Plan]." Motion to Dismiss the Writ ("MTD") at 2. Thus, respondents conclude that "at the time the Petition was filed, Petitioner was not then, and is not now, a participant in the DeWolff Plan." *Id.* This conclusion is baseless. The statutory term "participant" is defined in section 3(7) of ERISA, 29 U.S.C. 1002(7). As explained in Part I., *infra*, this definition of "participant" expressly includes a "former employee" who "may become eligible to receive a benefit of any type" from the ERISA plan at issue. This Court has held that the definition includes any "former employee" who has "a colorable claim that * * * he or she will prevail in a suit for benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-118 (1989). As explained in detail in Part I., *infra*, petitioner unquestionably meets this definition.[2] As such, respondents' motion must be denied.

2. Even if there were a colorable argument that petitioner is no longer a participant in the DeWolff Plan, respondents' motion would still have no merit.

a. Respondents' first argument in favor of dismissing the writ is an inexplicable suggestion that this case is now moot. Even if petitioner's withdrawal of $119,000 could support a colorable argument that he is no longer a participant under ERISA, the mere existence of such a potential argument would certainly not moot this case. As explained in Part II., *infra*, a legal and factual dispute over whether petitioner is a participant under ERISA does not mean that he has no personal stake in this litigation.

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[2] In conclusorily asserting otherwise, the motion filed by respondents does not even make a passing reference to section 3(7) of ERISA.

b. Respondents next argue that this case must be dismissed because resolution of the two questions presented requires this Court first to adjudicate whether or not petitioner remains a participant in the DeWolff Plan. As explained in Part III., *infra*, this argument is unfounded. It presumes that whether petitioner is a participant under ERISA is a question of standing that must be adjudicated prior to the resolution of any other issues in the case. This presumption is wrong. Respondents' argument (which involves both legal and factual questions that petitioner will dispute) is nothing more than an additional defense on the merits that respondents may assert on remand if, and when, petitioner prevails in this Court.

c. Finally, respondents argue that the writ should be dismissed because it now "presents additional legal issues beyond the scope of the questions presented by the Petition." MTD at 7. As explained in Part IV, *infra*, this argument is groundless for two independent reasons.

First, what the motion refers to as "new legal issues" is nothing more than a single "perceived misstatement of fact or law in the petition" (*i.e.*, petitioner's claim that he is a participant). Supreme Court Rule 15.2. Respondents waived any right to assert such a perceived misstatement when they failed to raise the issue in their brief in opposition to the petition for a writ of certiorari. Respondents' motion for dismissal is predicated entirely on the July 2006 withdrawal by petitioner of $119,000 from the DeWolff Plan. This event occurred *six months before* respondents filed their brief in opposition. Although respondents claim to have recently "discovered" the July 2006 withdrawal, they cannot avoid their obligations under Rule 15.2 by merely claiming to have been unaware of a withdrawal of plan funds when one re-

spondent is the fiduciary of the plan and the other respondent is the Plan itself.[3]

Second, respondents' claim that petitioner is no longer a "participant" is nothing more than a post-pleading defense on the merits that has no bearing on the two legal questions before this Court. This Court granted certiorari on two purely legal questions regarding the scope of relief available to a "participant" under ERISA. Because the lower courts resolved this case on a Federal Rule of Civil Procedure 12(c) motion, they *accepted as pled* the fact that petitioner is a participant in the DeWolff Plan. The fact that respondents could conceivably prevail later in this litigation by convincing a lower court (via some non-pleading motion) that petitioner has lost his "participant" status has no relevance to the proceedings before this Court. This Court regularly adjudicates cases in which a Rule 12(c) motion has been granted by the lower courts. In so doing, the Court does not concern itself with issues on which the plaintiff could *conceivably* lose on remand. Put simply, this case remains an ideal vehicle through which to resolve the two important questions on which certiorari has been granted.

3. For the reasons outlined above, which are each explained in more detail below, respondents' motion should be denied. Should the Court have any inclination to consider the merits of respondents' argument, however, petitioner requests that the Court defer such consideration to the hearing of the case on the merits. See, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 494-495 ("postpon[ing] * * * consideration of [respondents' suggestion of mootness] to a hearing on the merits"). See also *Hamdan v. Rumsfeld*, 126 S. Ct. 1317 (2006); *Oregon v. Guzek*, 126 S. Ct. 675 (2005).

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[3] Respondents' motion does not even allege that *no* employee of DeWolff was previously aware of petitioner's withdrawal. See MTD App. at 1a (Decl. of Morgan Buffington ¶2) (merely stating that *one officer* of DeWolff recently learned of petitioner's withdrawal of $119,000).

ARGUMENT

I. PETITIONER IS A "PARTICIPANT" UNDER SECTION 3(7) OF ERISA

Respondents claim to have recently "discovered that * * * Petitioner withdrew all of his funds from his account in the DeWolff [Plan]" and that, as a result of that withdrawal, petitioner is no longer a participant in the DeWolff Plan (and was not a participant when he filed his petition for certiorari in this Court). MTD at 2. Respondents' assertion that petitioner is no longer a participant in the DeWolff Plan is baseless.

A retiree driven to withdraw his remaining balance from a 401(k) account that he believes to have been depleted by fiduciary misconduct unquestionably constitutes a participant under both the express terms of ERISA and this Court's precedent. The contrary position—that a former employee whose 401(k) account has been partially depleted through fiduciary theft or negligence must leave his remaining funds with the thief or mismanager in order to continue litigating to recover the monies already lost—finds no support anywhere in the text of ERISA or this Court's caselaw. Unsurprisingly, this contrary position—now urged by respondents—has been explicitly rejected by every court of appeals to have addressed the issue, see *Graden v. Conexant Systems Inc.*, No. 06-2337, 2007 WL 2177170 (CA3 July 31, 2007); *Harzewski v. Guidant Corp.*, 489 F.3d 799 (CA7 2007), as well as by the United States.[4]

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[4] The United States Department of Labor has appeared in several cases including *Graden* and *Harzewski* to argue against the position asserted by respondents in their motion.

A. "Participant" is defined by ERISA and this Court to include any "former employee" with "a colorable claim" that he "will prevail in a suit for benefits"

Respondents' only support for its supposed *legal* conclusion that petitioner is no longer a participant within the meaning of ERISA is a citation to a *declaration* of one of its employees. See MTD at 2 (citing Declaration of Morgan Buffington for the proposition that "Petitioner * * * ceased to be a participant in the Plan" as a result of his withdrawal of funds from his account). Moreover, respondents' motion makes absolutely no mention of section 3(7) of ERISA, which expressly defines the term "participant" as

> any employee *or former employee* of an employer * * * *who is or may become eligible* to receive a benefit of any type from an employee benefit plan which covers employees of such employer.

29 U.S.C. 1002(7) (emphasis added).[5]

In addition to omitting entirely any reference to the operative statutory definition, respondents also fail to meaningfully address this Court's opinion in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In that case, this Court explicitly held that a former employee is a "participant" under ERISA if he has "a colorable claim that * * * he or she will prevail in a suit for benefits." *Id.* at 117-118.

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[5] Congress knew how to narrow the term participant when it wanted to do so. For example, section 101(a) of ERISA uses the phrase "participant *covered under a plan*" to narrow the class of people to whom plan administrators must provide information, in many cases without charge and without request, under ERISA's automatic disclosure requirements. 29 U.S.C. 1021(a) (emphasis added); see also 29 C.F.R. 2510.3-3(d) (providing a regulatory definition of the phrase "participant covered under a plan" that is considerably narrower than the broad definition of "participant" in 29 U.S.C. 1002(7))); 29 C.F.R. 2509.95-1(b) (clarifying that 29 C.F.R. 2510.3-3(d) does not affect who is a participant for purposes of bringing suit under section 502(a)(2) of ERISA).

There is no dispute that petitioner is a "former employee" of DeWolff. And he asserts in this very lawsuit that he is entitled to additional benefits under the DeWolff Plan because the breach of fiduciary duty by respondents caused the DeWolff Plan, and therefore his individual account within the Plan, to hold fewer assets than it would have held had his investment instructions been followed. This Court's resolution of the two questions on which certiorari has been granted (*i.e.*, whether petitioner is seeking to restore "any losses to the plan" within the meaning of sections 502(a)(2) and 409 and whether he is seeking "appropriate equitable relief" within the meaning of section 502(a)(3)) will determine whether petitioner may continue with his lawsuit and, thus, whether he "may become eligible to receive a benefit of any type" from the DeWolff Plan. See 29 U.S.C. 1002(7) (defining "participant" to include a "former employee * * * who is or may become eligible to receive a benefit of any type").

B. The withdrawal by petitioner of $119,000 from his 401(k) account in July of 2006 has no relevance to this lawsuit

Petitioner does not contest that he is a former employee of DeWolff who, after being injured by respondents' misconduct, withdrew $119,000 from his 401(k) account in the DeWolff Plan.[6] Based entirely on the fact that petitioner made this withdrawal, respondents mistakenly conclude that he is

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[6] It is hardly surprising that petitioner chose to withdraw the *undisputed* portion of his interest in the DeWolff Plan. At the time of his withdrawal in July of 2006, he was no longer an employee of DeWolff and had already spent over two years in litigation trying to restore to the plan monies that were lost through respondents' misconduct. See BIO App. 1a-42a (June 2, 2004, complaint filed by petitioner). What is surprising, however, is the fact that respondents continued to litigate with petitioner for more than *a year* and supposedly without any knowledge of a fact that they now claim to be legally dispositive. The legal significance of respondents' inaction is discussed in Part IV, *infra*.

now a "former participant" with no right to pursue litigation to recover his lost benefits.

The term "former participant" is nowhere defined in ERISA. As explained above, what *is* defined is the term "participant." 29 U.S.C. 1002(7). Rather than so much as attempt to argue that petitioner does not satisfy the statutory definition of "participant," respondents have instead summarily labeled him a "*former* participant," hoping to merely assert that which they cannot establish.

Respondents' concept of "former participant" is predicated on the mistaken notion that a retiree's eligibility to obtain plan benefits ends when his account balance becomes zero. That is not the case.[7] Imagine if a retired employee of DeWolff had $50,000 in his individual plan account and that, one day, DeWolff stole the full $50,000, leaving the retiree with a zero balance. Under respondents' reasoning, the retiree would be a "former participant" no longer "eligible" to receive any benefits because he has a zero account balance and no ability (as a *former* employee) to make new contributions to his individual account. That is preposterous. Benefits necessarily include what one would have had in one's plan account absent the fiduciary breach. See, *e.g.*, *Harzewski*, 489 F.3d at 804-05 ("The benefit in a defined contribution plan is, to repeat, just whatever is in the retirement account when the employee retires or *whatever would have been there had the plan the plan honored the employee's entitlement*, which includes an entitlement to prudent man-

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[7] Perhaps respondents' confusion is the result of an implicit (and incorrect) assumption that a participant's individual account balance always represents that participant's *entire* cognizable interest in the plan. A simple example illustrates the folly of such an assumption: if a former employee has a balance of $50,000 in his 401(k) account and the plan fiduciary, through an administrative error, re-allocates half of this amount to the account of a different participant in the plan, the former employee is still entitled to $50,000 in plan benefits notwithstanding the fact that his account now only shows a balance of $25,000.

agement." (emphasis in original)). One's eligibility to recover lost benefits does not cease when one's account balance is zero. Were that so, breaching fiduciaries would have every incentive to steal the remainder of an injured retiree's account, so as to deprive him of the right to sue for the recovery of the initial losses. Or worse, they could steal the entirety of a retiree's account in the first place.

Respondents undoubtedly believe that the situation here is distinguishable from the above example because petitioner "voluntarily" reduced his account balance to zero.[8] That is a distinction without a difference. Whether a former employee is entitled to a plan benefit does not turn on whether he is seeking to restore his account balance from $50,000 to $100,000 or from $0 to $50,000. In other words, there is nothing in the definition of "participant" to suggest an analytical difference between (1) a former employee whose individual plan account was reduced from $100,000 to $50,000 through fiduciary misconduct who sues to restore the balance to $100,000 and (2) another former employee who suffers the same fate but chooses first to withdraw the $50,000 left in the account and then sue to restore the balance to $50,000. Respondents' position would require that a retiree who has been a partial victim of fiduciary theft or negligence leave his remaining funds with the thief or tortfeasor in order to have the right to pursue (through litigation) the lost benefits. There is nothing in the text of ERISA or this Court's cases interpreting it to suggest that Congress intended such a rule.[9]

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[8] For the purposes of this motion only, petitioner will not dispute any of the facts alleged by respondents. Of course, petitioner reserves the right to dispute these facts should respondents assert this defense (*i.e.*, that petitioner is not a "participant") at the appropriate time (*i.e.*, on remand if petitioner's interpretation of section 502(a) is accepted by this Court).

[9] Respondents mischaracterize various cases from the courts of appeal in an effort to manufacture a legal controversy. For example, re-

II. THIS CASE IS NOT RENDERED MOOT BY RESPONDENTS' NEW CLAIM THAT PETITIONER IS NOT A "PARTICIPANT"

Respondents' first argument in favor of dismissing the writ is a suggestion that this case is moot. Even if petitioner's withdrawal of $119,000 could support a colorable argument that he is no longer a "participant" under ERISA, however, the existence of such a potential argument would not moot this case. Respondents' suggestion of mootness reveals a fundamental misunderstanding of the meaning of the term. As explained below, a legal and factual dispute over whether petitioner is a participant under section 3(7) of ERISA does not suddenly deprive petitioner of any personal interest in the outcome of this case. It is difficult to understand the precise basis for respondents' mootness argument because it is articulated in such a conclusory fashion. As such, petitioner responds separately to both possible articulations of "mootness" contained in respondent's motion.

First, respondents' motion repeatedly suggests that this case is moot because petitioner is no longer a participant in the DeWolff Plan. See, *e.g.*, MTD at 2 ("The newly discovered fact that Petitioner is no longer a participant in the Plan moots this case."); *id.* at 3 ("Many lower courts have held that *former* plan participants may not bring suit under

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spondents state that "[m]any lower courts have held that former plan participants may not bring suit under section 502(a)(2)," MTD at 3 (emphasis in original) (citing cases from the Ninth and First Circuits), whereas "[o]ther courts have ruled that former participants can pursue a section 502(a)(2) claim for additional benefits under the terms of the plan." *Id.* (citing a case from the Fifth Circuit). This statement is false. A "former *participant*" can never bring a claim under ERISA. The various court of appeals opinions cited by respondents merely address whether or not the former *employee(s)* involved in those cases were asserting colorable claims for benefits and, thus, *participants* under the statute. See, *e.g.*, *Crawford v. Lamantia*, 34 F.3d 28, 33 (CA1 1994) (holding that the former employee "failed to show that defendants' * * * breach of fiduciary duty had a direct and inevitable effect on *his* benefits" (emphasis in original)).

section 502(a)(2)." (emphasis in original) (citations omitted)); *id.* at 4 ("[B]ecause Petitioner is no longer a Plan participant, he lacks 'a still vital claim for prospective relief.'" (citation omitted)). Respondents' argument that petitioner is no longer a participant, however, is nothing more than a garden-variety legal defense. A brief examination of respondents' argument illustrates why such a defense is not the basis of a mootness challenge. As explained above, section 3(7) of ERISA defines the term "participant." 29 U.S.C. 1002(7). If one is a participant under section 3(7), he or she is authorized to bring suit under section 502(a) of ERISA. 29 U.SC. 1132(a) (authorizing a "participant" to bring several different types of civil actions). Whether an individual satisfies the definition of "participant" in § 3(7) of ERISA may involve disputed issues of law and/or disputed issues of fact. The motion filed by respondents provides an example of both such disputes.

Respondents' new argument that petitioner is not a participant in the DeWolff Plan presents a contested issue of law. As explained in Part I., *supra*, petitioner takes the position that, even if the facts regarding his $119,000 withdrawal are as respondent has alleged, he is a "participant" under § 3(7) of ERISA. See 29 U.S.C. 1002(7) (defining "participant" to include a "former employee * * * who is or may become eligible to receive a benefit of any type.").[10] Respondents' new argument may also present several contested issues of fact. In addition to disputing respondents' legal interpretation of 29 U.S.C. 1002(7), petitioner may ultimately dispute one or more of the facts alleged by respondents regarding his $119,000 withdrawal. As this Court explained in *Powell v. McCormack*, 395 U.S. 486, 500 (1969) ("[R]espondents [argument] confuses mootness with [a de-

[10] Describing this as a disputed legal question is quite charitable to respondents. As already noted above, respondents' legal position has been explicitly rejected by every court of appeals to have addressed the issue, as well as by the United States.

fense on the merits; namely,] whether Powell has established a right to recover against the Sergeant at Arms, a question which it is inappropriate to treat at this stage of the litigation.").

Second, the motion repeatedly asserts that petitioner's claim is moot because, according to respondents, he cannot personally obtain any relief even if his interpretation of sections 502(a)(2) and/or 502(a)(3) is accepted. See, *e.g.*, MTD at 4 (asserting that "the only way the recovery sought under [petitioner's] theory would reach Petitioner is through a payment directly to Petitioner."); *id.* at 3 ("Petitioner's 502(a)(2) claim is moot because, under the legal theory supporting this claim, there is no type of relief in which Petitioner would have any legally cognizable interest."); *id.* at 4 (asserting that "any recovery achieved by the Plan would not benefit the Petitioner, because it could only go to the Plan."). This assertion, however, is predicated entirely on the assumption that petitioner is no longer a "participant" in the DeWolff Plan which, as explained above, is itself nothing more than a defense on the merits that cannot be asserted by respondents at this stage in the proceedings.

A brief examination of petitioner's theory of recovery illustrates this point. As will be explained at length in his opening brief, which must be filed with this Court in 5 days, petitioner's position is that both sections 502(a)(2) and 502(a)(3) entitle a 401(k) plan participant to seek repayment to his ERISA plan of losses that were caused by fiduciary breach. If petitioner prevails in this Court, he will then continue to litigate the merits of his claim. Respondent is free, of course, to seek summary judgment on the ground that petitioner is no longer a participant under ERISA. If, however, respondents do not succeed with such an argument and petitioner ultimately obtains a judgment against respondents, this judgment will be paid directly to the DeWolff Plan. At that point, respondents will be required under ERISA to allocate some or all of these recovered monies to petitioner's 401(k) account in the plan. See, *e.g.*, Employee

Benefits Sec. Admin., U.S. Dep't of Labor, *Field Assistance Bulletin 2006-1*, at 8 (Apr. 19, 2006) <http://www.dol.gov/ebsa/pdf/fab2006-1.pdf> ("[A] plan fiduciary must be prudent in the selection of a method of allocating settlement proceeds among plan participants. Prudence in such instances, at a minimum, would require a process by which the fiduciary chooses a methodology where the proceeds of the settlement would be allocated, where possible, to the affected participants in relation to the impact the [fiduciary breach] may have had on the particular account."). Thus, the fact that respondents could conceivably convince a lower court that petitioner is not a participant does not render this case moot. The fact that respondents could conceivably convince a lower court that petitioner is not a participant is no different than the fact that they might convince a lower court that no fiduciary duty was breached. The existence of such legal defenses does nothing to support respondents' groundless assertion that there is no longer a live controversy in which petitioner has a current interest.

III. Neither Question Presented Requires That This Court Address Respondent's New Claim

Apart from their suggestion of mootness, respondents appear to argue that dismissal of the writ is warranted because resolution of the two questions presented requires this Court to first adjudicate whether petitioner remains a "participant" in the DeWolff Plan. See, *e.g.*, MTD at 7 (asserting that "[t]he new question whether the change in Petitioner's status precludes his theories * * * appears logically antecedent to the issues on which the Court granted *certiorari*"). Respondents are wrong. The two questions on which this Court has granted certiorari do not require this Court to decide whether petitioner is a "participant," just as they do not require this Court to decide whether respondents did, in fact, breach their fiduciary duty. Both are legal issues that respondents may choose to contest on remand should petitioner prevail in this Court.

Respondents' belief that petitioner's status as a "participant" under 29 U.S.C. 1002(7) is "logically antecedent" to the questions presented presumes that whether petitioner is a participant under ERISA is a question of standing that must be adjudicated prior to the resolution of any other issues in the case. This presumption is wrong. The Seventh Circuit explained this point in a recent case (*Harzewski, supra*) presenting the precise facts at issue here. Writing for the court, Judge Posner rejected the argument that the named plaintiffs in a class action lawsuit against the fiduciaries of a defined contribution plan lacked standing to sue under section 502(a)(2) merely because those plaintiffs had "cashed out" of the plan after the complaint had been filed. In addition to explaining why such named plaintiffs were certainly "participants" within the meaning of ERISA, Judge Posner cogently explained why such an assertion is not a standing argument, but rather is merely a defense on the merits. In his words:

> Obviously the named plaintiffs have standing to sue in the sense of being entitled to ask for an exercise of the judicial power of the United States as that term in Article III of the Constitution has been interpreted, because if they win they will obtain a tangible benefit. But there is also a nonconstitutional doctrine of standing to sue, one aspect of which is the requirement that the plaintiff be within the "zone of interests" of the statute or other source of rights under which he is suing.
>
> * * *
>
> But if "zone of interests" were interpreted too broadly, standing and merits would merge, since any time a plaintiff failed to prove that the statute under which he was suing entitled him to relief, thus revealing that he was not someone whose interests the statute had been intended to protect, his suit would be dismissed for want of standing. * * * Except in extreme cases * * *, the question

> whether an ERISA plaintiff is a "participant" entitled to recover benefits under the Act should be treated as a question of statutory interpretation fundamental to the merits of the suit rather than as a question of the plaintiff's right to bring the suit.

Harzewski, 489 F.3d at 803-04.

Judge Posner's reasoning and concern about merging the standing and merits analyses apply with equal force to this case: respondents' very arguments about why the writ should be dismissed are largely identical to their arguments about why petitioner fails to state a claim under section 502(a). That is, respondents' putative "procedural challenge" merges with their merits-based argument that petitioner has "failed to prove that the statute under which he was suing entitled him to relief, thus revealing that he was not someone whose interests the statute had been intended to protect." *Id.*[11]

IV. RESPONDENTS' NEW CLAIM SHOULD NOT BE ADDRESSED BY THIS COURT.

As explained above, resolution of the two questions presented certainly does not require this Court to address the new legal question that DeWolff is attempting to raise. Nonetheless, respondents' maintain that the writ should be dismissed because it now "presents additional legal issues beyond the scope of the questions presented by the Petition." MTD at 7. This argument is groundless for two independent reasons.

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[11] In any event, even those courts of appeal that refer to this issue as one of "statutory standing" acknowledge that it is not a threshold matter. See, *e.g., Coan v. Kaufman,* 457 F.3d 250, 256 (CA2 2006) ("Although we have referred to a plaintiff's status as a 'participant' under ERISA as a question of 'standing,' * * * it is a statutory requirement, not a constitutional one. Unlike Article III standing, which ordinarily should be determined before reaching the merits * * * statutory standing may be assumed for the purposes of deciding whether the plaintiff otherwise has a viable cause of action.").

A. Respondents' new claim has been waived

As respondents themselves observe, this Court granted certiorari after both the petition for a writ of certiorari and the Solicitor General's invitation brief asserted that petitioner was a participant in the DeWolff Plan. MTD at 2 (quoting Petition at 5, 8 and U.S. Brief at 2). As explained in Part I., *supra*, petitioner remains a "participant" within the meaning of section 3(7) of ERISA. Respondents' new contention that petitioner is not a participant is nothing more than an argument that should have been included in respondents' brief in opposition to the petition for writ of certiorari.[12]

Respondents' argument is in reality what this Court's Rule 15.2 refers to as a "perceived misstatement of fact or law in the petition that [arguably] bears on what issues properly would be before the Court if certiorari were granted."[13] Rule 15.2 of this Court states that:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in

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[12] By improperly treating their new legal argument as if it has already been accepted, respondents beg the very issue presented by the motion. MTD at 7 ("It is, at a minimum, clear that the question whether Petitioner can continue to pursue his claims * * * now that he is no longer a participant in the Plan was not presented in the Petition. Petitioner's change of status would thus seem to require the Court to decide a legal issue raised here for the first time.").

[13] Petitioner has inserted the word "arguably" into the text of Rule 15.2 because, as explained in Section IV.B, *infra*, there is no way that respondents' "perceived misstatement" (even if true) could have any effect "on what issues properly would be before this Court").

> opposition, and not later, any perceived misstatement made in the petition.

Respondents' failure to argue that petitioner is no longer a "participant" in its brief in opposition presents a textbook case of waiver.

The only factual event that forms the basis for respondents' dismissal argument is petitioner's July 2006 withdrawal of non-disputed funds from the DeWolff Plan. This event occurred *six months before* respondents filed their brief in opposition (and prior to the Fourth Circuit's issuance of its mandate). The existence of petitioner's July 2006 withdrawal was in no way hidden from respondents. After all, one of the two respondents is the very ERISA plan from which petitioner made his withdrawal, and the other respondent is the fiduciary of the plan. Thus, respondents' claim to have only recently "discovered" the existence of petitioner's July 2006 withdrawal is irrelevant.

This Court has regularly rejected such attempts to avoid the spirit of Rule 15.2. For example, in *Canton v. Harris*, 489 U.S. 378 (1989), this Court noted that:

> Petitioner's petition for certiorari challenged the soundness of that conclusion, and respondent did not inform us prior to the time that review was granted that petitioner had arguably conceded this point below. Consequently, we will not abstain from addressing the question before us.

Id. at 385. Similarly, in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), this Court observed that:

> Respondents also argue that the benefit due under their ERISA-regulated employee benefit plans is simply the membership in the respective HMOs, not coverage for the particular medical treatments that are delineated in the plan documents. See Brief for Respondents 28-30. Respondents did not identify this possible argument in their brief in op-

> position to the petitions for certiorari, and we deem it waived. See this Court's Rule 15.2.

Id. at 212 n2.

In sum, this Court should proceed to address the two questions on which it granted certiorari. These important questions, unlike respondents' new argument, were squarely presented to and decided by the court of appeals. In the words of this Court,

> Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived. Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it.

Oklahoma City v. Tuttle, 471 U.S. 808, 815-16 (1985) (emphasis in original).

B. Respondents' new claim is improper

In attempting to press its new argument at this point in time and before this Court, respondents fundamentally misunderstand the procedural posture of this case. In reviewing the propriety of an order granting a Rule 12(c) motion for judgment on the pleadings, this Court must take as true all of the allegations in the complaint, see, *e.g.*, Pet. App. 16a (where the district court noted that "[w]hen considering dismissal, a plaintiff's well pleaded allegations are taken as true, and the complaint, including all reasonable inferences, is construed liberally in the plaintiff's favor" (citation omitted)); *id.* at 3a (where the Fourth Circuit noted that "[a]ccepting the allegations as pled, as we must, we shall assume without deciding that defendants' alleged conduct amounted to a breach of their fiduciary duties"), including

the allegation that petitioner is a participant. See, *e.g.*, Pet. App. 15a (where the district court observed that "Plaintiff is a participant in an employee savings plan administered by DeWolff"); *id.* at 2a (where the Fourth Circuit observed that "Plaintiff James LaRue has participated in this 401(k) plan since 1993").

Petitioner sought a writ of certiorari, and this Court granted the writ to decide two questions: first, whether the relief sought by petitioner is available to a participant under section 502(a)(2) of ERISA and second, whether the relief sought by petitioner is available to a participant under section 502(a)(3) of the statute. Petitioner's complaint does not allege any facts that undermine the conclusion that he is a participant. As such, if respondents wish to challenge that allegation, they must do so by introducing material outside the pleadings (*i.e.*, evidence) in a motion for summary judgment. And it is beyond question that such a motion can be made only on remand to the district court—not in an affidavit in this Court.

Respondents' new argument that petitioner is no longer a participant in the DeWolff Plan, even if colorable, is no different than if respondents were now suggesting that new evidence had recently come to light to definitively prove that they had in fact followed petitioner's investment instructions, or that their failure to follow petitioner's investment instructions actually caused an increase in the value of his account (and the Plan), rather than a loss. Once this Court has decided that a petition for writ of certiorari should be granted, it does not concern itself with the *possibility* that the plaintiff might ultimately lose his or her case on remand. Such is the fate of many litigants before this Court. Where certworthy legal questions are squarely presented in a case—as they are here—this Court will proceed to resolve those questions. Petitioner does not ask this Court for guaranteed success in his lawsuit; instead he asks this Court for a chance to move forward with his claims. By correcting the lower courts' mistaken interpretation of sections 502(a)(2)

and 502(a)(3), this Court will clear the way for petitioner—and many other litigants like him—to play their part in the critically important remedial scheme of ERISA.

CONCLUSION

The motion to dismiss the writ should be denied.

Respectfully submitted.

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